No. 83-371

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Petitioners,

v.

ITT WORLD COMMUNICATIONS, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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MEMORANDUM OF THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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October 3, 1983

QUESTION PRESENTED

Amicus Curiae the American Bar Association ("ABA") addresses the following question:

Whether the Government in the Sunshine Act, 5 U.S.C. § 552b, which generally requires that agency meetings be open to public observation, applies when members of an administrative agency who do not constitute a quorum and have not been authorized to conduct official business on the agency's behalf participate in informal and general discussions with their foreign counterparts concerning issues of common interest.*

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* The petitioners also raise a second question:

> "Whether suit may be brought in district court to enjoin allegedly *ultra vires* action by the Federal Communications Commission even though jurisdiction to review the agency's orders is vested exclusively in the court of appeals and the precise issue raised in the district court suit could have been reviewed by this method." Petition for a Writ of Certiorari at 6.

While the ABA regards this question as important and as one that should be resolved by the Court, we do not discuss this issue here inasmuch as the ABA has no established policy position with respect to this issue.

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The ABA respectfully submits this Memorandum *amicus curiae* in support of the Petition for a Writ of Certiorari to review the decision of the United States Court of Appeals for the District of Columbia Circuit. That decision is reprinted in Appendix A to the petition and is reported at 699 F.2d 1219. Counsel for the petitioners and counsel for the respondents have consented to the filing of this Memorandum.

INTEREST OF AMICUS CURIAE

The ABA is an organization of more than 290,000 members of the bar, including lawyers in private practice

and in the Government. The stated purposes of the organization are, *inter alia*, "to advance the science of jurisprudence" and "to promote throughout the nation the administration of justice." ABA Const., art. 1, § 1.2. Within that broad mandate, the ABA has a special interest in ensuring that the procedures followed by administrative agencies are conducive to effective and rational decisionmaking and at the same time that they provide an environment of fairness and due process to all interested parties.

Through its Section of Administrative Law (composed of lawyers with particular expertise or interest in this area), the ABA has been involved in the study of procedural laws including, among others, the Government in the Sunshine Act. As a result of work undertaken by a Special Committee on Open Meetings Legislation, the House of Delegates of the ABA, in 1975, adopted a resolution generally favoring the then-pending legislation, with the caveat that

> "[t]he definitions of agency 'meeting' should be limited to relatively formal gatherings, of at least the number of members required to take action on behalf of the agency, that result in the conduct of official agency business. Chance encounters and informational or exploratory discussions of agency members should not be included in the definition unless they predetermine agency action." 100 Rep. A.B.A. 665 (1975).

The ABA's position was presented to Congress through testimony of the then-Chairman of the Section of Administrative Law, and the Special Committee worked actively to secure passage of the legislation.

In addition, the ABA has sponsored the Commission on Law and the Economy, which studied the effective functioning of administrative agencies, and the ABA's Coordinating Group on Regulatory Reform has, in recent years, worked closely with Congress in considering issues

involving judicial review of agency orders. This case raises important issues about the administrative process and judicial review thereof, issues that have broad implications with respect to the capacity of administrators to make informed decisions in the public interest.

ARGUMENT

The court of appeals holding that the Sunshine Act applies to informal exchanges of information by administrative agency members who are not authorized to act on behalf of the agency is unprecedented and, without in any way promoting the objectives of the Act, calls into question the ability of such members to engage in the kind of informal, but nonetheless informative, discussions that are essential to enable them to carry out their statutory duties.

The Sunshine Act was not promulgated to impede the practical capacity of members of administrative agencies to communicate among themselves, with their staffs, with other agencies, and with members of the public if less than the number of agency members required to take action are involved in the discussions at any given time and if those discussions do not result in or determine agency action. But the effect of the court's decision is to do just that. By unnecessarily hampering the power of agency administrators to garner information essential to the development of expertise and to reasoned decision-making, the court deals a critical and unnecessary blow to the efficacy of the administrative process.

The essence of the controversy turns on the Sunshine Act's definition of meeting:

> "the deliberations of at least the number of individual agency members required to take action on behalf of the agency where such deliberations determine or result in the joint conduct or disposition of official agency business . . . ." 5 U.S.C. § 552b(a)(2) (1982).

The court chose to read this definition as encompassing, *inter alia*, informal meetings with outsiders, although it conceded that the term "deliberations" could be "read narrowly to encompass solely the internal process of weighing and examining proposals that precedes a formal decision by the agency." 699 F.2d at 1241.[1]

The court based its broad and far reaching interpretation on a single sentence in the legislative history of the Sunshine Act—the suggestion by the Senate Committee that the definition of meeting was intended to include "*hearings and meetings with the public.*" *Id.* (quoting S. Rep. No. 354, 94th Cong., 1st Sess. 18 (1975)) (emphasis added by the court). Whatever the force of that sentence, the court's interpretation clearly stretches it beyond its plain meaning. When the text of the Act is compared with the congressional concern it is clear that the Senate Committee simply meant that if the functional requirements of the definition of meeting were otherwise met—that is, the conversations constituted deliberations involving the joint conduct or disposition of agency business—the gathering would be a meeting subject to the requirements of the Act, even if it took the form of a hearing or meeting with members of the public. This is so because the Sunshine Act is directed at deliberations *among* agency members; it is not directed at communications *between* agency members (or staff) *and* persons outside the agency. The latter is the purview of the *ex parte* rules. *See* 5 U.S.C. §§ 554(d), 557(d) (1982).

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[1] Subsequently, the court summarily disposed of the argument that the Act supports a distinction between pre-decisional and post-decisional activities. 669 F.2d at 1242. Yet the entire structure of the Act and, particularly, the use of the term "deliberations" suggest that it is the agency's decisional process and not its implementation process which is governed by the Act. And there is no question that what was involved in this case was an effort by agency members to implement through discussions with their foreign counterparts an agency decision already made in compliance with the Sunshine Act.

A second prong of the court's holding relates to the provision that for a meeting to be covered by the Sunshine Act, there must be at least a quorum of the agency or a quorum of a "subdivision . . . authorized to act on behalf of the agency." 699 F.2d at 1240 (quoting H.R. Rep. No. 880 (Part 1), 94th Cong., 2d Sess. 7 (1976)). The court found that the FCC members who participated in the discussions were authorized to attend the CP meetings in their official capacity and, further, that they constituted a quorum of a Telecommunications Committee, which was authorized to make a limited number of specified decisions on behalf of the FCC. 699 F.2d at 1248-49. While the FCC rules make clear that none of the matters within the purview of the committee required or involved attendance at the CP meetings, or were in fact undertaken at the CP meetings, the court nonetheless concluded that, because a quorum of this committee was present, the commissioners constituted a "subdivision . . . authorized to act on behalf of the agency." 699 F.2d at 1240. In so ruling, the court seems to have regarded the requirement for authorization "to act on behalf of" the FCC as meaning no more than an authorization to "be present" or "to discuss" agency matters. *See* 699 F.2d at 1240-41.

If the court's construction is correct, the result is a substantial increase in the coverage of the Act. At present, over 50 agencies are covered by the Sunshine Act and substantial numbers of state agencies attempt to comply with its provisions or the provisions of similar state statutes. 1 Gov't Disclosure (P-H) ¶ 10,303. The court's decision in this case—a decision of enormous precedential significance—places those agencies in an untenable position. For if any two or more members of a collegial agency are authorized to represent the agency in any gathering or forum, however limited their authority to act, and if any discussion of agency business at such a gathering meets the "deliberations" test, then, under the court's decision, these members may not meet with per-

sons from outside the agency to discuss any matter within the official concern of the agency without complying with the provisions of the Sunshine Act. Such a result would have a pronounced (and deleterious) effect on the interaction between the agencies and the public, which the court itself recognizes to be "the 'bread-and-butter' of government administration." 699 F.2d at 1249.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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